

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Lead Case No. 08-99000-smb

4 Case No. 08-01789-smb

5 Adv. Case No. 09-01161-smb

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7 SECURITIES INVESTOR PROTECTION CORPORATION,

8 Plaintiff,

9 v.

10 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, et al.,

11 Defendants.

12 - - - - - x

13 PICARD,

14 Plaintiff,

15 v.

16 KINGATE GLOBAL FUND, LTD. et al.,

17 Defendants.

18 - - - - - x

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1 United States Bankruptcy Court
2 One Bowling Green
3 New York, NY 10004
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5 June 27, 2018
6 10:28 AM
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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE
24

25 ECRO: F. FERGUSON

1 HEARING re Trustee's Twelfth Omnibus Motion to Disallow
2 Claims, Solely with respect to claimant Peter Moskowitz

3
4 HEARING re Conference re Motion for an Order Establishing
5 Omnibus Proceeding for the Purpose of Determining the
6 Existence, Duration, and Scope of the Ponzi Scheme at BLMIS

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8 HEARING re Conference re Letters submitted on June 6 [ECF
9 Doc. # 348] & June 18 [ECF Doc. # 352]

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25 Transcribed by: Sonya Ledanski Hyde

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16 Pro Se

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18 ALSO PRESENT TELEPHONICALLY:

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20 NATHANIEL S. KELLEY

21 PATRICK MOHAN

22 DAVID J. SHEEHAN

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1 P R O C E E D I N G S

2 THE COURT: Madoff.

3 MS. BELL: Your Honor, we filed an agenda with the
4 Court yesterday.

5 THE COURT: Do you have an extra copy? Oh, I have
6 it. Thank you.

7 MS. BELL: So we plan on proceeding in the order
8 of the agenda unless the Court would prefer otherwise.

9 THE COURT: No, we can start with the conference.

10 MS. BELL: Good morning, Your Honor. My name is
11 Stacey Bell. Baker Hostetler, counsel for the Trustee.
12 We're here on a status conference on the Trustee's motion
13 for an order establishing an omnibus proceeding on the
14 existence, duration, or scope of the Ponzi scheme at BLMIS.

15 As the Court is aware, the Trustee filed his
16 motion on February 23rd in response to this Court's numerous
17 request to set up an omnibus proceeding to address the Ponzi
18 scheme at BLMIS, or as the Court as called it, the fraud
19 proceeding.

20 The goal, as established in the motion of the
21 Trustee -- Trustee's motion is to consolidate the remaining
22 good faith actions. And at the time we filed the motion,
23 there were 155 good faith actions; we're now down to 153.
24 Two of those cases have been dismissed. And we received on
25 April 11th objections from eight law firms representing 106

1 of the 155 cases.

2 Since that time, that number has gone down to
3 seven law firms because we're down to 153 cases. And so
4 we've, over the last several weeks, been engaged in
5 telephonic discussions with the Defendants, with the
6 objecting Defendants.

7 We've also had, as of three weeks ago, a
8 conference with the Defendants to go through some of the
9 objections and to see how we can streamline the issues for
10 the Court.

11 Two weeks ago we filed -- we haven't yet put in
12 our reply, and I know that's part of what we'll do today,
13 but two weeks ago, I filed a letter with the Court
14 requesting an extension of time, an extension of 60 days, so
15 that the parties would have additional time to continue
16 those discussions.

17 We think, just based on the last meeting we had,
18 that we're at least optimistic that we will be in a position
19 to agree on a general framework as to what the omnibus
20 proceeding would look like.

21 We've had numerous discussions about discovery and
22 what the Trustee intends to include in the omnibus
23 proceeding. And so we hope that the Court would give us the
24 ability to continue those discussions, because we're
25 optimistic that those will be fruitful.

1 Your Honor, I'm happy to go through anything you'd
2 like to discuss. I think that just in the interest of
3 judicial economy and in the interest of having the omnibus -
4 - the Ponzi proceeding only once, as the Court has
5 requested, the Trustee is amenable to making certain
6 revisions to the proposed order, though we do think that the
7 order as proposed is -- offers a practical solution to the
8 issue of -- the common issue that runs across all cases.

9 And I don't think that there is any quibble on that, any
10 quarrel on whether the issue of the Ponzi scheme at BLMIS is
11 an issue that runs across all the cases that are remaining.

12 We do think it's a fair and efficient way to go
13 about establishing that issue in having a proceeding on that
14 issue. But I recognize, just based on the objections that
15 we've received, that the Defendants -- and I don't propose
16 to speak for them, nor do I think they would want me to --
17 that the Defendants have objected to just about every
18 portion of the Trustee's proposed order.

19 THE COURT: But you said you'd made progress on
20 those objections?

21 MS. BELL: I think we've made progress. And I
22 don't know if there's someone from the defense group that
23 would like to address this, but we've had discussions around
24 if we were to do a consolidated proceeding that doesn't go
25 all the way through trial. And, again, I'm not committing

1 to that here because we still think that what the Trustee
2 has put forward is really the best solution to a difficult,
3 a challenging question.

4 But if we were to do, for example, consolidated
5 discovery, and I think that would get rid of many of the
6 objections that the Defendants have around the stern issues,
7 jury trial issues -- around due process concerns; the
8 ability to litigate their own defenses.

9 And so the goal was to come up with something that
10 would streamline the issues but get these cases moving,
11 recognizing that we are trying to get -- not have
12 inconsistent results. And in the interest of judicial
13 economy, the Trustee is amenable to the extent that it
14 doesn't negate the purpose of the omnibus proceeding.
15 Because if we agree to a procedure that doesn't accomplish
16 what the Court has asked us to accomplish, then obviously
17 that doesn't do the job that we need to do.

18 THE COURT: How do you deal with the Defendant's
19 concerns about the right to a jury trial? Because you're
20 asking me to make either findings of fact or proposed
21 findings of fact in connection with the onset of the Ponzi
22 scheme, right?

23 MS. BELL: Yes. I think, Your Honor, just based
24 on the revised order that we're contemplating now, and
25 again, I think further discussions with the Defendants would

1 get us closer to figuring out whether this is something we
2 could agree to, but if we had consolidated discovery, then I
3 think that issue would no longer be before Your Honor
4 because --

5 THE COURT: But how would consolidated discovery
6 resolve a 7th Amendment objection?

7 MS. BELL: So, the idea would be for this
8 proceeding to go through the closed effect in expert
9 discovery -- or if we bifurcate the proceeding into two
10 parts. And so the first part would simply deal with
11 discovery and we would get all the cases -- they would
12 proceed on the same evidence.

13 Now, at the end of that part of the proceeding,
14 the Defendants, I'm sure, would make either a motion to
15 withdraw the reference or there would be arguments on
16 whether or not Your Honor could enter a final judgment.
17 It's our review, however, that the Court certainly could --
18 many of these cases have claims that were filed and/or
19 objections pending...

20 THE COURT: Well, that's what I wanted to ask you.
21 In how many of these cases are there pending objections?

22 MS. BELL: I think we have those numbers here,
23 Your Honor. Of the 106 cases -- and I'll get you that
24 number in a moment but --

25 THE COURT: You said there were 153.

1 MS. BELL: There are -- so we started with 153.
2 The objecting Defendants represent at this point initially
3 106 but we dismissed one of those cases, so there are 105
4 cases that are represented here just by the objecting
5 Defendants. The other Defendants did not object to the
6 Trustee's option.

7 I do think, however, Your Honor, that if we have
8 consolidated discovery and the proceeding stops there, then
9 perhaps at the end of that proceeding -- and, again, the
10 Trustee -- we don't want to negotiate against ourselves, but
11 part of what we're trying to establish is, I think just
12 based on the Defendant's papers and the argument, the
13 discussions we've had, there is at least some openness to
14 having consolidated discovery.

15 If what's before the Court -- and the proposed
16 order before the Court would deal with just that issue, then
17 we could make a part two of this motion where we could fight
18 over whether or not the Court can hear some of those cases.
19 I think 111 of the cases have claims, and 72 of those cases
20 -- 111 of the 153 have --

21 THE COURT: These -- but not just objections.
22 Have -- what number did you say? 72?

23 MS. BELL: 111.

24 THE COURT: 111.

25 MS. BELL: 72 with objections.

1 THE COURT: They filed objections to the Trustee's
2 determination and those objections are still pending?

3 MS. BELL: Well --

4 THE COURT: If they're not pending, I don't think
5 it implicates the claims allowance process.

6 MS. BELL: Your Honor, my colleague, Nick Cremona,
7 is prepared to argue that -- the issue on --

8 THE COURT: I already addressed that in Apfelbaum,
9 I think.

10 MR. CREMORA: I completely agree, Your Honor. I
11 think that there are -- to the -- in Apfelbaum, there, there
12 was a claim determination by the Trustee and no objection
13 was ever filed.

14 In the cases when we're speaking about these 72
15 cases, there are, from the Trustee's perspective, objections
16 to the Trustee's determination that are extant, that are
17 still outstanding and they're outstanding because there's
18 pending litigation.

19 THE COURT: My recollection of the procedure was
20 the Trustee reviewed the claims, made a determination, and
21 then the creditor had 30 days, I think, to object. And
22 there are 72 unresolved objections, you're saying?

23 MR. CREMORA: That's correct.

24 THE COURT: Okay.

25 MR. CREMORA: And they're unresolved, Your Honor,

1 because they are related to these adversary proceedings.

2 It is our position that those claims and the
3 objections cannot be resolved until they are resolved in the
4 context of the adversary proceeding because they raise the
5 very same issues and defenses that are squarely before the
6 Court in the adversary proceeding. And to give credence to
7 any of those defenses would necessarily implicate the net
8 equity in those claims objections.

9 And I would just point out just for the record, as
10 I'm sure Your Honor is aware, Judge Daniels recently
11 addressed this very issue in a decision where he denied
12 three motions to withdraw the reference that were filed by
13 Ms. Chaitman. And just so the Court is aware --

14 THE COURT: And then she withdrew her claims,
15 right? Her objections?

16 MR. COOPER: Yes. And I would also like to say
17 for the record, Your Honor, that the Trustee's position on
18 the withdrawal of those claims, we view those as a legal
19 nullity. Bankruptcy Rule 3006 specifically addresses the
20 withdrawal of a claim. And when you have, in this instance,
21 a claim that was filed, an objection interposed, a complaint
22 that was filed in response, and the Claimant significantly
23 participated in the underlying case, all three of which of
24 those requirements have been met here by those Claimants --
25 one cannot do that unilaterally. That has to be done by

1 notice motion and order of this Court.

2 Our view, again -- and we've brought this to the
3 attention of the District Court -- is that those are legal
4 nullities. That can't be done unilaterally. It's our view
5 that you can't invoke the Bankruptcy Court's juris --

6 THE COURT: But the origin of that rule is so you
7 couldn't circumvent the submission to the equitable
8 jurisdiction of the Bankruptcy Court.

9 MR. COOPER: Precisely.

10 THE COURT: Right, right.

11 MS. BELL: But, Your Honor, I think it's our goal
12 to take those issues off the Court's -- off the table right
13 now if we're able to reach an agreement with the
14 Defendants...

15 THE COURT: So, what discovery do you think is
16 still open in these cases? My recollection -- I'll tell you
17 why I ask it -- my recollection is the only two issues were
18 expert discovery, or expert rebuttal reports, I guess, and
19 then expert discovery. And I think Ms. Chaitman had served
20 some subpoenas on other former employees of BLMIS. That was
21 all put off to the end of the Madoff deposition, which I
22 understand is not over now. So, other than that, what's
23 left?

24 MS. BELL: Yes, Your Honor, in both the Madoff Day
25 One Order and the Madoff Day Two Order, the Trustee -- and I

1 think the hearings relating to Madoff's deposition, the
2 Trustee reserved the right to seek additional fact discovery
3 and expert discovery.

4 And so what we're proposing in connection with the
5 testimony that Madoff has given, frankly, and I think in a
6 number of hearings before this Court we've all agreed that
7 some new issues have come to the fore -- there are certainly
8 new defenses that the Trustee gets -- we would like the
9 opportunity to refute those defenses, both with fact
10 witnesses in the same vain that we took Madoff's deposition
11 -- there are a number of former BLMIS employees that we can
12 now speak to, I think, as of -- up until January of last
13 year, when cert was denied in the criminal proceeding, we
14 didn't have the opportunity to speak with those former
15 employees. We'd like the opportunity to do that.

16 In addition to that, there has been discovery
17 skirmishes. And so I think what we're trying to set up in
18 the omnibus proceeding is a framework for dealing with all
19 those issues so that on this Ponzi issue all the Defendants
20 are proceeding on the same record, the same factual stuff.
21 So if there's a request for -- whatever the request is for,
22 we can negotiate it in this proceeding what would be
23 produced.

24 So I think we're looking for both fact discovery
25 and expert discovery. And we had outlined some general

1 perimeter -- parameters in our order. I think that we are
2 open to having further discussions about those -- the types
3 of discovery that the Court would allow. But I certainly
4 think to refute Madoff's deposition and testimony we get
5 both facts and expert discovery.

6 THE COURT: All right. Let me hear from the
7 Defendants. Thank you. Do any of the Defendants want to be
8 heard?

9 MR. MOSKOWITZ: I would like to be heard.

10 THE COURT: Who is this?

11 MR. MOSKOWITZ: Peter Moskowitz.

12 THE COURT: This doesn't concern you. You're not
13 a Defendant in an adversary proceeding, or are you? No,
14 this doesn't concern you. Your matter will come later, Mr.
15 Moskowitz. Go ahead.

16 MS. NEVILLE: Good morning, Your Honor. Carole
17 Neville from Dentons. I think we agree for the most part
18 with what the Trustee's counsel has told you. There are a
19 number of differences in our cases that make it more
20 difficult to have this omnibus proceeding, but we did have
21 one very productive meeting. And, in fact, we had a second
22 scheduled for this very time slot, which you have usurped.

23 So, I think we are moving forward and that is how
24 we would like to proceed, instead of trying to parse through
25 that order at this point.

1 THE COURT: Okay. Anybody else want to be heard?
2 Well, it sounds like -- I'm certainly not going to stop you
3 from speaking. My own idea is I could consolidate and try
4 the 72 cases where there are pending claims objections and
5 just trying those claims objections, but try the same issues
6 essentially.

7 So I don't have a problem with that. I just have
8 a question about the jury issue. There's no reason not to
9 consolidate discovery. You know, on the basic question of -
10 - I guess, if there was a Ponzi scheme. I know some people
11 have argued that there wasn't. And when it began, and
12 whether it was limited to the split-strike customers, or
13 whether it involved the convertible arbitrage customers
14 also. So how do you propose we proceed now?

15 MS. BELL: Your Honor, we have a couple of
16 proposals. One is, if the Court would like -- I know my
17 letter requested a 60 day extension, but to the extent that
18 the Court would like to have a status conference at the next
19 omnibus hearing, we're open to that. We are preparing our
20 reply papers but I think it would probably be more fruitful
21 to have those papers submitted after we've had the
22 opportunity to continue the discussions with the objecting
23 Defendants, so we know what we're responding to.

24 It is our hope that once -- depending on what
25 those discussions yield, we could put before the court a

1 revised order that would address, I think, some of Your
2 Honor's concern about the jury trial issues and what we
3 propose to do about that.

4 So, we're proposing a status conference in July or
5 an August date?

6 THE COURT: Well, just doing discovery doesn't
7 implicate the jury trial concerns. It'd be the same
8 discovery and presumably a District Court will consolidate
9 and -- consolidate the discovery anyway.

10 MS. BELL: Yes.

11 THE COURT: I mean, I suppose you can have a
12 consolidated trial in a District Court for the jury cases.

13 MS. BELL: Right. And so our proposed order would
14 simply stop to the extent that we're, again -- we're not
15 proposing any options. And, again, I think the original
16 order is really the Trustee's best attempt at coming up with
17 something that would streamline the issues.

18 THE COURT: Right.

19 MS. BELL: But that said, I think if we're able to
20 reach an agreement with the Defendants in consolidated
21 discovery, then the idea would be to put that before the
22 Court as a revised order.

23 THE COURT: Okay. Why don't we adjourn this for
24 30 days? I know it's the summer but I'd like to move these
25 along. We've made progress with the good faith cases. See

1 if we can finish them off.

2 MS. BELL: Just for clarification, Your Honor,
3 would that be a status conference on the next omnibus date?
4 Just for scheduling purposes, we have not yet put in our
5 reply. Should we hold that until after the next status
6 conference?

7 THE COURT: A reply in support of your motion?

8 MS. BELL: Yes. Yes, Your Honor.

9 THE COURT: You could put in a reply. I mean, I
10 think I know what's appropriate and what's not appropriate.
11 For example, I wouldn't permit any opt out or opt in if
12 you're -- if -- for example, with respect to the claims
13 objections, I'd just order a consolidated trial. Unless
14 somebody could convince me that their case is so unique that
15 it would be unjust or unfair to have a consolidated trial.

16 But at least with the Trustee going forward, it's
17 the same evidence that affects all the cases. And then
18 people, I guess, can come in and argue they were convertible
19 arbitrage customers or they can prove that certain treasury
20 stock that was purchased was actually listed on their
21 account and then sold -- it wasn't a fictitious profit.

22 But those are unique to individuals. The
23 underlying argument about when the Ponzi scheme began is the
24 same in every case.

25 MS. BELL: Yes, we agree with that, Your Honor. I

1 guess, would it be Your Honor's preference for us to submit
2 the reply if we're not -- we haven't concluded the
3 negotiations with the Defendant?

4 THE COURT: Or why don't you submit a reply, let's
5 say, in three weeks, okay?

6 MS. BELL: Okay.

7 THE COURT: And then we'll have another conference
8 in 30 days. I'm going to give you another day.

9 MS. BELL: Perfect. Great. Thanks, Your Honor.

10 THE COURT: Let's say July 25th, okay?

11 MS. BELL: Great.

12 MR. CREMORA: July what, Your Honor?

13 THE COURT: July 25. It's a little less than 30
14 days but -- it's about four weeks. At 10 o'clock.

15 MS. BELL: And I think that's -- thanks, Your
16 Honor.

17 THE COURT: Okay, thank you.

18 MR. CREMORA: Thank you, Your Honor.

19 THE COURT: Let's -- everybody's excused who wants
20 to leave. Let's deal with Mr. Moskowitz's case because he's
21 on the line. All right, Mr. Moskowitz, there is your
22 objection to the Trustee's determination that you don't have
23 a net equity claim because you withdrew more from your
24 account than you deposited. So I'll hear from you now.

25 MR. MOSKOWITZ: The first thing I'd say is I was

1 never a direct customer of BMLIS. I had two accounts. One
2 was a Roth IRA, and the other was a regular IRA. And what
3 happened was I converted the regular IRA into a Roth IRA and
4 that was performed by Retirement Accounts, Incorporated, my
5 Trustee.

6 And when the account was converted, the Roth --
7 the regular IRA was closed and they directed BLMIS to
8 reregister the stocks into the name of the new account, and
9 they told me that they had done that and taken possession,
10 and then put it into the new account. So, one account was
11 closed, another was opened.

12 I did not directly participate in that because I
13 wasn't allowed to act as my fiduciary. And when I filed the
14 claim, I only did it because I was told by Fiserv, which ad
15 -- which our retirement accounts had become -- I was told
16 that they met with people from SITC and they were not going
17 to file the claims, that I would have to do it personally
18 and that the Trustee would accept my signature on the
19 account.

20 But I didn't think that was proper because when a
21 Roth IRA -- any kind of IRA is set up, you're not allowed to
22 act as your own fiduciary. And I didn't have the
23 information of what had transpired at the time. The time
24 was short. I only had 60 days to file a claim, and if I
25 didn't file it, then all was lost.

1 THE COURT: But you filed a claim. And the
2 question now is whether you have a net equity claim. How
3 much money did you deposit into the accounts?

4 MR. MOSKOWITZ: I did not deposit anything into
5 the accounts. The Retirement Accounts did.

6 THE COURT: Okay. How much was deposited into the
7 accounts as to which you filed a net equity claim?

8 MR. MOSKOWITZ: I don't know.

9 THE COURT: Well, the Trustee says it was --

10 MR. MOSKOWITZ: I know that the Trustee had a
11 figure. I don't have it in front of me exactly.

12 THE COURT: Let me interrupt you. It's about
13 \$455,000 deposited between 1992 and 2001. Do you agree or
14 disagree with that?

15 MR. MOSKOWITZ: That was deposited into two
16 different accounts.

17 THE COURT: Okay.

18 MR. MOSKOWITZ: And one was -- I don't know if
19 that figure is correct but it may be.

20 THE COURT: Well, do you have any evidence of a
21 different number? That's what the Trustee's books and
22 records show.

23 MR. MOSKOWITZ: No, I don't.

24 THE COURT: Pardon?

25 MR. MOSKOWITZ: I don't.

1 THE COURT: Okay. How much did you withdraw from
2 the accounts?

3 MR. MOSKOWITZ: I don't have that figure. I k now
4 that the Trustee has his figure.

5 THE COURT: The Trustee's figure is \$499,000. Do
6 you disagree with that?

7 MR. MOSKOWITZ: And if you accept the cash-in,
8 cash-out theory, it's probably correct, according to the
9 figures that he -- that I was sent.

10 THE COURT: Okay.

11 MR. MOSKOWITZ: But disagree with the methodology.

12 THE COURT: What methodology do you say the
13 Trustee should've used?

14 MR. MOSKOWITZ: Well, if he's not accepting the
15 final statement as what was in the account -- and when I
16 opened my second accounts, it was opened with stocks. And
17 there's no credit given to me there.

18 THE COURT: Well, the Trustee contends that prior
19 to the time that you opened a second account, you had
20 exhausted the first account, so there was nothing to
21 transfer to the second account.

22 MR. MOSKOWITZ: I agree he contends that.

23 THE COURT: Right. Well, do you have any other
24 evidence?

25 MR. MOSKOWITZ: I have the evidence from

1 Retirement Accounts, Incorporated directing BMLIS to
2 reregister stocks and BMLIS supposedly did it, and I was
3 given a 1099 for withdrawing \$399,000 worth of stock from
4 BMLIS, which I paid taxes on.

5 THE COURT: Okay. Is there anything else?

6 MR. MOSKOWITZ: I don't think so, Your Honor.

7 THE COURT: All right. Anything from the Trustee?

8 MAN 1: Unless Your Honor has any questions, no.

9 THE COURT: The issue -- one of the issues that
10 Mr. Moskowitz has raised is whether he was even a customer
11 because he had a fiduciary, I guess, representing him in
12 connection with the account. What's the response to that?

13 MAN 1: It's an admission that he didn't have a
14 direct customer account.

15 THE COURT: Well, but did he have an account?

16 MAN 1: He did have a customer account.

17 THE COURT: All right. So he had an account. I
18 should say, Mr. Moskowitz, if you didn't have an account,
19 you have no debt equity claim. So that's not a good
20 argument for you. But what I'll do is I will sustain the
21 Trustee's determination and overrule the objection.

22 The evidence provided by the Trustee under the
23 cash-in, cash-out method, which is the method that the 2nd
24 Circuit has directed in two cases be used, whether it's
25 direct cash in of cash out or whether it involves an inter-

1 account transfer, as these accounts do, is that Mr.
2 Moskowitz deposited to the two accounts -- or into the
3 account, it was always only one account, although it changes
4 in form -- \$454,697.02 and withdrew \$499,003.98. So he
5 withdrew in the aggregate more than he deposited.

6 And based upon the timing of the deposits and
7 withdrawals at the time the account was converted from a
8 regular IRA to a Roth IRA, and supposedly funded with an
9 inter-account transfer, there was nothing left. In the
10 earlier account, whatever the statements purported to say
11 were irrelevant really, unfortunately, to what you actually
12 had, Mr. Moskowitz, because all those entries were
13 fictitious and the courts have rejected reliance -- or the
14 use of the statements to prove what was in the account.

15 So, I will overrule your objection and I will
16 direct the Trustee to submit an order.

17 MAN 1: Thank you, Your Honor.

18 THE COURT: Thank you

19 MAN 1: Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Moskowitz. Last is the
21 Kingate matter. Go ahead.

22 MR. LOIGMAN: Thank you, Your Honor. Robert
23 Loigman of Quinn Emanuel for the joint liquidators of the
24 Kingate Funds. Hopefully, we don't really have any dispute
25 to discuss here today.

1 THE COURT: It sounds like a dispute. You want to
2 mediate and they don't.

3 MR. LOIGMAN: I think -- well, let me give Your
4 Honor a little bit of background and then I'll tell you
5 where I think we're at right now. As a very brief
6 background, the case is now in active discovery. We have
7 exchanged probably hundreds of thousands of documents, and
8 depositions are now underway and they are continuing.

9 A few weeks ago, the Trustee proposed that we
10 adjourn the fact discovery cutoff by four months from what
11 was then July 31st to November 30th. In the context of
12 discussing that proposal, we proposed, in turn, that the
13 Trustee agree that at the end of fact discovery, whenever
14 fact discovery may actually end, we have a mediation.

15 And we believed then, as we believe now, that
16 mediation is appropriate in this case where you have on both
17 sides of the caption Court-appointed officials. You have
18 the Trustee, who is trying to assemble and ultimately
19 distribute money to victims of Madoff's fraud; and on our
20 side of the caption you have the joint liquidators, and the
21 investors in the Kingate Funds are in the same boat. They
22 invested the vast bulk of their money with Madoff and they
23 are themselves Madoff victims. It seems like an ideal
24 situation to try to resolve through a mediation.

25 At the time that I raised that a few weeks ago,

1 the Trustee correctly pointed out in response that we had
2 attempted to reach settlements in the past and, in fact,
3 came very close to actually concluding settlements on two
4 occasions. That's true but those settlement discussions,
5 the last one was six years ago now. It was in --

6 THE COURT: Have you made an offer to the Trustee?

7 MR. LOIGMAN: We have not made an offer recently.
8 But to sort of jump ahead, to bring you into the discussions
9 that we had even more recently with the Trustee, what we
10 have done is -- a few years ago the joint liquidators
11 retained separate counsel specifically for mediation
12 purposes. And the counsel they brought in was Morrison &
13 Foerster. The reason they had selected Morrison & Foerster
14 is because they have actually mediated with the Trustee
15 other major cases. My understanding is successfully they've
16 reached settlements. And here at counsel table with me
17 today is James Peck, who obviously Your Honor knows, who is
18 with Morrison & Foerster and would actively participate in
19 the mediation process.

20 And while we have not made a specific proposal now
21 -- and the Trustee has said we are free to make a specific
22 proposal at any time -- one of the factors that has been
23 missing from past discussions that we think has -- would
24 really make a material difference is having a third party
25 neutral. Having somebody oversee the process, give

1 structure to it, and perhaps bring the two sides to be able
2 to recognize the points made by each other with, I think, a
3 little more understanding and, hopefully, to bring to it a
4 successful resolution.

5 As recently as yesterday, counsel for the joint
6 liquidators -- that included my firm, Quinn Emanuel, also
7 Morrison & Foerster -- spoke with counsel for the Trustee
8 about today's conference. And it's my understanding, Your
9 Honor, that basically the Trustee has said they would agree
10 to have a mediation at the conclusion of discovery. We
11 proposed that rather than wait until the end of discovery to
12 start picking a mediator, putting in place deadlines for
13 mediation briefs, whatever the procedures may be, that we
14 start doing that if not now, within the next month or so, so
15 that we don't -- to expedite the process. And so by the
16 time we get to the end of fact discovery, we are in a
17 position to really charge ahead full speed with the
18 mediation.

19 Obviously, I'll let the Trustee speak for
20 themselves. I don't want to speak for them. But it's my
21 understanding that we essentially now have an agreement to
22 that effect. And if that's so, then I don't think there's
23 anything that we're asking the Court's guidance on today.

24 THE COURT: You want to select a mediator now, but
25 wait until the end of discovery to mediate?

1 MR. LOIGMAN: Well, I think, we would be happy to
2 proceed with mediation --

3 THE COURT: I understand.

4 MR. LOIGMAN: -- even sooner. The Trustee has
5 made the point to us that we're now in the middle of very
6 active discovery. There are, as we acknowledged, very
7 important witnesses who are scheduled already, who are
8 coming up. And the Trustee has made fairly clear to us on a
9 number of occasions, they would like to complete this
10 discovery process we're in, which is nearing completion,
11 before sitting at the table and mediating. And we respect
12 that. And that's why we're saying we're okay -- we're
13 willing to say mediation won't start until the end of fact
14 discovery.

15 It doesn't preclude us, as Your Honor points out,
16 as the Trustee points out, from putting an offer to the
17 Trustee before then. If it's appropriate at a certain time
18 we'll do that. But all we're saying is at the same time it
19 shouldn't preclude us from talking about the logistics of
20 the mediation to make sure it's put in place so that we
21 don't have sort of a long delay at the end of fact discovery
22 but, instead, we're really ready to just move forward with
23 mediation at that point in time.

24 THE COURT: Okay.

25 MS. PONTO: Good morning, Your Honor. Geraldine

1 Ponto, representing the Trustee. I'm here with Stephanie
2 Ackerman, my colleague also for the Trustee.

3 Your Honor, we did not oppose mediation. Two
4 years ago, when I was contacted by the special mediation
5 counsel for the joint liquidators, I said then that we did
6 not oppose mediation. I said we were just at that point
7 embarking on discovery. In fact, the joint liquidators at
8 that point were still resisting the production of documents,
9 which took years to obtain. So we now have that. We are
10 now in deposition discovery.

11 THE COURT: So, what's left of discovery? Because
12 I didn't sign the order extending discovery, I wanted to
13 know what was left. I'd like to move this case along and
14 try it, if it's necessary.

15 MS. PONTO: We have -- as Your Honor knows,
16 because you've issued letters of request for ten -- what we
17 thought were London-based witnesses; those depositions have
18 -- six of them, I believe, have occurred. We have Mr.
19 Ceretti and Grosso yet to occur. We couldn't find Mr.
20 Chapman, who was one of the witnesses. We understand he's
21 relocated to France, and we're in the process of identifying
22 him.

23 Your Honor just recently signed another letter of
24 request for another witness, Ms. Salahuddin. She is in
25 Ireland. We can report that, I believe it was yesterday,

1 the Irish court did give effect to Your Honor's letter
2 rogatory, rather. I correct myself. And we are now in the
3 process of seeing whether her counsel -- her U.S. counsel
4 happens to be Mr. Ceretti and Mr. Grosso's counsel --
5 whether they will accept service of the Irish court order or
6 whether she has Irish counsel. So, we have that one to go.

7 We're looking for Mr. Chapman. There are two
8 other witnesses in Bermuda that we are looking to depose.
9 We may do one of those informally. We have four former
10 Tremont employees that we just firmed updates with them, and
11 I believe we sent an email to Mr. Loigman to confirm those
12 dates, subject to his availability. Because we always try
13 to have a date that's mutually convenient. As you may
14 recall, Tremont was the co-manager with Kingate Management
15 for ten years. So we have four of those witnesses.

16 So, we're winding down, and we have hopes -- we
17 could not complete the discovery by July 31 but we're
18 hopeful. We don't know, but we're very hopeful and we will
19 do everything we can to complete fact discovery by November
20 30, which is the date that we sought.

21 In fact, Your Honor, in the proposed case
22 management order, I did include -- after -- actually, this
23 was agreed between Mr. Loigman and myself before he wrote
24 the letter to the Court. So I was surprised by it. I said
25 in this case management order in Paragraph 8 that the

1 Trustee and the joint liquidators will continue to discuss
2 the appropriate timing of a mediation. That could happen
3 today, tomorrow -- there was no restriction.

4 THE COURT: Well, it sounds like you agree that
5 the mediation, if it's going to occur, should occur at the
6 end of discovery.

7 MS. PONTO: At the end of fact discovery. They
8 don't want to go through the expense of expert discovery,
9 and we accommodated that. So, we will -- and our position
10 has not changed from two years ago, when I was first
11 contacted by mediation counsel. It hasn't changed recently.
12 There's been no change. We have always been open to
13 mediation.

14 The reasons, however, that Mr. Loigman cites --
15 and there's really no need to argue them because the Court-
16 appointed officials have been in place from the outset;
17 we've always been dealing with Court-appointed officials.
18 The second reason that a third party neutral is essential --
19 fine, but it hasn't been that. And that's why in my reply I
20 wanted the Court to know, it hasn't been the Trustee that's
21 resisted discovery. We had an agreement. We've had, as Mr.
22 Loigman points out -- we've had two agreements. But they
23 were, for one reason or another, they could not be
24 consummated.

25 So, in terms of those reasons, that hasn't changed

1 either. We are very receptive to settlement and we believe,
2 though, that as we go through the process of discovery,
3 we're learning more facts that strengthen the case.

4 THE COURT: Well, I guess the proposal is to
5 appoint a mediator now, or a neutral now, but have him or
6 her not start working, I guess, until the end of discovery.
7 What's your response to that?

8 MS. PONTO: We have some suggestions and we'd like
9 to discuss it with them. I told them that yesterday on the
10 phone. They were all on the phone. And we haven't gotten
11 further than "Let's discuss some suggested names."

12 THE COURT: Don't you have discovery -- isn't
13 Judge Moss overseeing discovery in this matter?

14 MS. PONTO: Judge Moss has --

15 THE COURT: So, why don't you just agree to
16 appoint him as the mediator and he can coordinate -- he can
17 use his judgment in terms of whether it's appropriate to
18 start mediation or to mediate any issues, or just wait until
19 the end of discovery. I understand you can't necessarily
20 give a complete position paper until you've completed your
21 discovery but, you know, somehow this mediation of the
22 merits, I think, is tied up to some extent with the cost of
23 all of this discovery that you're going through. That's my
24 suggestion but --

25 MS. PONTO: Judge Moss is --

1 THE COURT: I'm just -- you know, he's probably
2 familiar somewhat with the case. So he's up and running, he
3 had experience in this, you can select other mediators when
4 the time comes. I don't know -- I don't see a major benefit
5 to otherwise simply selecting a mediator and having the
6 mediator sit and wait because the Trustee's not going to be
7 in a position to articulate his position until he's
8 completed his fact discovery. That's basically -- that's
9 implicit in everything he's been saying.

10 MR. LOIGMAN: And, Your Honor, if I can --

11 THE COURT: But if you can pick somebody, that's
12 fine.

13 MR. LOIGMAN: I think to speak to that, Your
14 Honor, I agree there's no need for a mediator to sit around
15 and cool his or her heels for --

16 THE COURT: So, what's the mediator going to do?

17 MR. LOIGMAN: I think what our thinking was, is
18 our understanding from the Trustee was that they would agree
19 to mediation but only at the conclusion of fact discovery.

20 THE COURT: Which they've essentially done, as I
21 understand it.

22 MR. LOIGMAN: Which we respect. I think what --
23 and my colleagues at Morrison & Foerster are probably more
24 familiar with this than I am because they've engaged in
25 mediations with the Trustee before. My understanding is it

1 can take some time to actually -- because each party is
2 allowed to propose certain mediators, and then there can be
3 discussions as to the agreement.

4 THE COURT: But that's -- that's a week. You
5 know, that's a week's time, and if you don't agree -- in
6 other words, when that trigger occurs, if you don't agree,
7 then in seven days I'll select the mediator in an ultimate
8 sense.

9 MR. LOIGMAN: So we're happy to work with the
10 Trustee to get a mediator selected. And all we wanted to do
11 was to make sure that happened sufficiently in advance so
12 that there wouldn't be a delay at the conclusion of
13 discovery.

14 MS. PONTO: Mr. Loigman has also committed, Your
15 Honor, that when we say at the conclusion of fact discovery,
16 should that -- should we have to seek a further extension of
17 time, and no party really wants that, that it will be
18 whenever fact discovery concludes. That is when we will
19 commence mediation. That was our agreement yesterday on the
20 phone.

21 THE COURT: Why don't you embody this into your --
22 a revised scheduling order, so everybody's in agreement on
23 that? And, as I said, I'm not inclined to appoint a
24 mediator because I don't think that a mediator is necessary
25 now. Because I don't think the mediator is really going to

1 accomplish anything. And it doesn't take as long as you
2 say. The timing is after the parties have submitted their
3 positions, which the Trustee is not ready to do until the
4 Trustee completes discovery.

5 So, submit a revised order. I'll reiterate my
6 suggestion that you think about -- it doesn't matter to me -
7 - but you think about using Judge Moss, who can in
8 combination oversee any discovery disputes and also if he
9 thinks they're appropriate, since he has a lot of experience
10 in this, to mediate or conduct a settlement conference
11 either during or after. But I leave that to you.

12 MR. LOIGMAN: Your Honor, I did want to raise one
13 final point, which his -- and we can certainly, with the
14 Trustee, submit a revised scheduling order that will provide
15 for the mediation. I think earlier in this conference, you
16 mentioned that you had not signed the extension --

17 THE COURT: I didn't think I did. I wanted to
18 hear what -- pardon?

19 MR. LOIGMAN: I think the Court did sign it.

20 THE COURT: Oh, all right. I'm sorry. I thought
21 -- I thought I didn't, because I wanted to hear what was
22 left. And now I'm looking at something like 15 depositions
23 that have to occur.

24 MR. LOIGMAN: But we will certainly submit a
25 revised --

1 THE COURT: It's not necessary. You can just
2 submit a letter agreement, if you like. I'm not concerned
3 that somebody's going to come back and say we didn't agree
4 to something that they said they agreed to on the record.

5 MR. LOIGMAN: Thank you, Your Honor.

6 THE COURT: All right. Thank you very much.

7 (Whereupon these proceedings were concluded at
8 10:53 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

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